SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 684

AMANA REFRIGERATION, INC.,
Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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In its brief in opposition to Amana's petition CBS has chosen to ignore the principal question presented by that petition, namely, whether or not the "commodity" issue is of sufficient importance that it should be decided by this Court. Having no sound argument to refute the obvious importance of the "commodity" issue, CBS has devoted its opposing brief to a complete presentation of its arguments on the merits of that issue. The purpose of this short reply brief is not to present Amana's position as to each of these arguments, but merely to point up the fact that these same arguments were made by CBS in the Court below, were answered by Amana, and were (except for the Court's reliance upon one phrase of the Clayton Act) either expressly rejected or ignored by that Court.

1. **Case Law.** The attempt by CBS in its opposing brief to characterize the "commodity" issue as having been settled by decisional law fails upon even a cursory reading of the cases cited in its brief. While Amana, in its principal brief filed with the Court below, discussed cases it considers to be in support of its position on this issue, the Court considered the instant case to be one of first impression and expressly rejected the argument that any case law was determinative. Specifically, the Court stated (Petition, A-6) that the cases cited by both parties were either irrelevant or "afford no real guide to the resolution of the issue."

2. **Legislative History.** The CBS argument based on legislative history is the very same argument presented unsuccessfully to the Court below. This argument focuses primarily upon post-enactment opinions as to the statute's coverage, the most unreliable source of Congressional intent. Specifically, the CBS contention based on Congressman Celler's proposed amendatory legislation (as to which there was no consideration given by the Congress inasmuch as the bill died in Committee) is very similar to the argument which was rejected by this Court in *United States* v. *E. I. du Pont de Nemours and Co.*, 353 U.S. 586 (1957), a case involving the scope of Section 7 of the Clayton Act *prior* to its amendment. Suffice it to say that, after the Court below "carefully considered" the history of the Clayton and Robinson-Patman Acts, it expressly rejected such history as a basis for decision of the "commodity" issue. (Petition, A-5.)

3. **Administrative Interpretation.** The CBS argument based on administrative interpretation has reference to the alleged positions of the Federal Trade Commission and the Department of Justice with respect to the "commodity"

issue. Answering this very same argument in the Court below, Amana pointed out that its factual premise was erroneous. The 1937 one-sentence opinion of the Federal Trade Commission regarding advertising space was expressly limited to the "circumstances" of the particular case to which it had reference—thereby implying that advertising space could, in the opinion of the Commission, be a "commodity" under *other* circumstances. And the Department of Justice changed its position on this issue after this Court handed down its decision in the *Times Picayune* case. This change in position is evidenced by the fact that, in its complaint filed in the Kansas District Court in 1959 (*United States* v. *Wichita Eagle Publishing Co.*, 1959 Trade Cases, par. 69,400), tie-in sales of advertising space were alleged to be violative of Section 3 of the Clayton Act as well as the Sherman Act. In any event, as stated by this Court in *du Pont:*

> "This Court has the duty to reconcile administrative interpretations with the broad antitrust policies laid down by Congress. Cf. *Automatic Canteen Co. of America* v. *Federal Trade Comm.*, 346 U.S. 61, 74, 73 S.Ct. 1017, 1024, 97 L.Ed. 1454. The failure of the Commission to act is not a binding administrative interpretation that Congress did not intend vertical acquisitions to come within the purview of the Act." 353 U.S. at 590 (1957).

4. **Nature of Television Time.** In its opposing brief (p. 5) CBS purports to take the position that it is immaterial whether the Facilities Agreement involved essentially "services" or the intangible right of product advertising and sponsorship identification. At the same time, however, it makes repeated and emphatic reference throughout its brief to the "services" rendered by CBS

under that Agreement.* This "services" contention was strongly asserted by CBS in the Court below and flatly rejected by that Court. Instead, the Court held that the intangible purchased by Amana from CBS under that Agreement was ". . . the privilege of having itself identified as sponsor of the program broadcast and making use of the permissible portion thereof for advertising its products." (Petition, A-5.) Expressly recognizing that one of the accepted definitions of "commodity" includes "privilege", the Court nevertheless decided the issue against Amana on the basis of *one phrase* occurring in Section 3 of the Clayton Act, a phrase which does *not* occur in Section 2(a) of that statute.

5. **Semantic Arguments.** CBS argues here, as it did below, that usage by Congressional committees and legislators of terms such as "chain stores", "merchandise", and "manufacturer" are inconsistent with the statute's applicability to intangibles. The fallacy in such argument, demonstrated in Amana's reply brief below, lies in its disregard of the fact that such terms are *equally inconsistent* with the statute's applicability to many situations and persons clearly covered. Perhaps reflecting the *inducement* for passage of the Robinson-Patman Act, such references, and the Congressional concern over chain-store abuses, by no means limits the outer reaches of the statute. What was said recently by this Court regarding Section 2(e) of the Act is equally applicable to Section 2(a):

> "This practice was one of the chief targets of § 2(e) of the Act. But it was not the only means by which the

* It should be noted on this score that the "services" listed in the second footnote appearing on page two of the CBS brief *may* have been performed "under" the Facilities Agreement, but they were not performed *pursuant to* that Agreement. The only essential *obligation* of CBS under that Agreement was to "cause television stations . . . to broadcast" the sponsor's program (CBS Appendix, p. 21). Amana was not concerned *how* this was done, whether by "interconnecting microwave relays" or otherwise, nor is any other sponsor so concerned.

brokerage function was abused and Congress in its wisdom phrased § 2(c) broadly, not only to cover the other methods then in existence but all other means by which brokerage could be used to effect price discrimination. (*FTC* v. *Henry Broch & Co.*, 363 U.S. 166 at 170 (1960))

With respect to CBS' reliance on the semantic argument of Mr. Rowe in his article in 67 Yale L. J. 1155 (1958), suffice it to say that two years earlier Mr. Rowe, referring to *Times-Picayune*, stated—and his statement epitomizes the current status of this issue—that the meaning of "commodity" was "a hazy proposition." (Petition, p. 10.)

6. **Practical Construction.** In the footnote appearing on page 12 of its brief, CBS sets forth a condensed version of the argument it presented to the Court below under the label, "practical construction". The inapplicability of the cited cases and the inherent fallacy of this argument were demonstrated by Amana in its reply brief filed with the Court of Appeals. This argument actually amounts to no more than a plea to maintain the status quo without regard to the anti-competitive consequences of the prevailing method of doing business on the part of the networks.*

CONCLUSION

The entire position of CBS in its opposing brief is predicated upon its tongue-in-cheek statement that the

* The reference by CBS, in the last sentence of the same footnote, to the continuing applicability of the Sherman Act to the networks ignores the distinct differences in burden of proof regarding competitive injury as between the Sherman and Clayton Acts. What is more important, if the decision of the Court below is allowed to stand, *one* of the practices of advertising media—price discrimination—*will* be "immune from scrutiny under the antitrust laws." In other words, unless the holding of the Court of Appeals is reversed, the television networks can, with complete immunity, discriminate in price in favor of their large sponsor-customers, even though such discrimination severely injures both competition and the disfavored sponsors.

"commodity" issue is "well settled". On the contrary, the unsettled status of this issue is reflected on every page of the opinion of the Court below which rejected the principal arguments of CBS and clearly decided the issue as a matter of first impression. The wishful conclusion of CBS—that the "commodity" issue is "well-settled"—also ignores this Court's opinion in *Times-Picayune* which compelled the Second Circuit to reach a conclusion diametrically opposed to that of CBS:

> "The correctness of the dismissal of this action raises, however, *important and apparently unresolved questions under the Clayton Act*. Thus, the Supreme Court reserved in the Times-Picayune case the question whether advertising space is a 'commodity' within the meaning of Section 2 of the Act. See 345 U.S. at Page 610, note 27, and cases cited." (*Syracuse Broadcasting Corp.* v. *Newhouse*, 236 F. 2d 522 at 527 (1956): emphasis added.)

Finally, the request of CBS that this Court defer the necessary resolution of the "commodity" issue until a conflict develops among the Courts of Appeal should not be seriously considered. The importance of this issue, for all of the reasons set forth in Amana's petition, requires that it be decided without further delay.

Respectfully submitted,

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